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**ABSTRACT**

The relationship of the University of Hawaii and its governing board to the state government, specifically the legislature and its major executive departments, was assessed with attention to institutional autonomy and the protection of academic freedom. Major findings of the review include the following: a 1978 constitutional amendment appears to give autonomy to the University of Hawaii and its board of regents; while university autonomy and social accountability appear to be inherently contradictory, in practice both concepts must be made compatible; the lay governing board is the solution to the dilemma of university autonomy versus social accountability, since the boards provide a mechanism for social accountability while serving as buffers against improper outside interference; the 1950 constitutional convention created the University of Hawaii as a body corporate; the 1978 constitutional convention granted the regents exclusive jurisdiction over the internal organization and management of the university; there are still many statutory conflicts with the board of regents' constitutional authority; attempts to implement the amendment by legislation have been largely futile; and the university and its regents must take the initiative to secure the institution's constitutional independence from state government interference.  
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# Monographs in Education

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## *Autonomy and Accountability at the University of Hawaii: A Review of the Significance and Implementation 1978 Constitutional Amendment*

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HIGHER EDUCATION POLICY STUDY NO. 2

COLLEGE OF EDUCATION

UNIVERSITY OF HAWAII-MANOA

AUTONOMY AND ACCOUNTABILITY AT THE UNIVERSITY OF HAWAII:

A REVIEW OF THE SIGNIFICANCE AND IMPLEMENTATION

1978 CONSTITUTIONAL AMENDMENT

by

ROBERT E. POTTER

PROFESSOR OF EDUCATION

FEBRUARY 1984

## FOREWORD

This monograph is the second in a series sponsored by the College of Education. The first, published in December 1982, was a study of the composition and roles of the Board of Regents of the University of Hawaii. Others are projected, not only of the policies and practices in higher education in Hawaii but also of the policies and practices in the public schools and other educational agencies. The College views these studies as part of its mission of research and service to the community, presenting significant information on issues and problems in education for public discussion. The views are those expressed by the individual faculty member who authored them and should not necessarily be ascribed to the College or University administration or the faculty as a whole.

The College of Education does hope that this effort to publish the research endeavors of its faculty will have impact on those who are involved in making decisions on educational policies and programs in Hawaii.

Andrew W. S. In

Dean  
College of Education  
February 1984

Previous Monograph in this series:

THE UNIVERSITY OF HAWAII BOARD OF REGENTS, 1907-1982: ITS  
COMPOSITION AND ROLES COMPARED TO OTHER BOARDS GOVERNING  
PUBLIC UNIVERSITIES, December 1982.

## AUTONOMY AND ACCOUNTABILITY AT THE UNIVERSITY OF HAWAII

A 1978 CONSTITUTIONAL AMENDMENT APPEARS TO GIVE "AUTONOMY" TO THE UNIVERSITY OF HAWAII AND ITS BOARD OF REGENTS.

In 1978, the Hawaii State Constitution was amended to give the University of Hawaii Board of Regents "exclusive jurisdiction over the internal organization and management of the university." Although this authority has been incorporated into the State statutes, there has been little change in the operation of the Board of Regents or the University. In the five years since the amendment's adoption, many questions have arisen as to its significance.

- 1) What does "exclusive jurisdiction" mean?
- 2) To what extent is, can, or should the University of Hawaii, as a public institution, be "autonomous"? To what extent is and should it be subject to the will of the Legislature or the regulation of State executive agencies, such as the Department of Budget and Finance or the Department of Accounting and General Services? How do existing and desired practices differ?
- 3) What has been the impact of government regulation on academic freedom and institutional effectiveness at the UH?
- 4) What was the intent of Constitutional Convention delegates in establishing the Board's authority and powers?
- 5) What, if any, have been the actual changes in Board or University authority?
- 6) What alternatives for action are open to the Board and the UH? What are some of the pros and cons of each alternative?

Although Hawaii's experience may be instructive to other States and their public institutions, the purpose of this monograph is not to develop a general theory of university autonomy or independence. The focus will be on the University of Hawaii and its governing board in relation to the State government, specifically the Legislature and the major executive departments of the State government, in an effort to lay the foundation for securing the institutional independence necessary for effective and efficient operation of the UH and for protection of its academic freedom.

### SUMMARY OF MAJOR POINTS OF THE STUDY

|                                                                                                                                                  | Page |
|--------------------------------------------------------------------------------------------------------------------------------------------------|------|
| 1. A 1978 Constitutional Amendment appears to give "autonomy" to the University of Hawaii and its Board of Regents.                              | 1    |
| 2. While university autonomy and social accountability appear to be inherently contradictory, in practice both concepts must be made compatible. | 3    |
| 3. The lay governing board is the American solution to the dilemma of university autonomy versus social accountability.                          | 5    |

|                                                                                                                                                                     |    |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------|----|
| 4. Governing boards serve a useful purpose in university governance.                                                                                                | 6  |
| 5. Boards provide a mechanism for social accountability.                                                                                                            | 7  |
| 6. Boards serve as "buffers" against improper outside interference.                                                                                                 | 8  |
| 7. Some States provide governing boards autonomy in order to enable them to protect the freedom of the university while maintaining some measure of accountability. | 12 |
| 8. The question of the power of the Board of Regents has arisen at each of the Hawaii Constitutional Conventions.                                                   | 13 |
| 9. The 1950 Constitutional Convention created the University of Hawaii as a body corporate.                                                                         | 14 |
| 10. Preparation for the 1968 Convention included a study of university independence.                                                                                | 15 |
| 11. Proposals in the 1968 Convention which would have limited the power of the BOR were not adopted.                                                                | 17 |
| 12. The 1978 Constitutional Convention granted the Regents "exclusive jurisdiction over the internal organization and management of the university."                | 18 |
| 13. The powers of the BOR are defined in the statutes.                                                                                                              | 25 |
| 14. The legal ambiguities and contradictions were pointed out in 1962 by a U. S. Office of Education study.                                                         | 29 |
| 15. There are still many statutory conflicts with the BOR's Constitutional authority.                                                                               | 31 |
| 16. There are many issues needing clarification.                                                                                                                    | 35 |
| 17. Attempts to implement the amendment by legislation have been largely futile.                                                                                    | 36 |
| 18. Negotiations with the Executive branch have resulted in no change.                                                                                              | 37 |
| 19. The University and its Regents must take the initiative to secure the institution's Constitutional independence from State government interference.             | 38 |
| References                                                                                                                                                          | 39 |
| Interviews                                                                                                                                                          | 41 |

WHILE UNIVERSITY AUTONOMY AND SOCIAL ACCOUNTABILITY APPEAR TO BE INHERENTLY CONTRADICTORY, IN PRACTICE BOTH CONCEPTS MUST BE MADE COMPATIBLE.

How much autonomy can any publicly-supported institution command in a democratic society? In a democracy, all institutions are responsible to the public which established and supports them and which depends on their services; hence, the public has interests which its institutions may not ignore nor refuse to acknowledge positively. On the other hand, many public institutions are expected to deliver specialized services which require a high degree of expertise from their practitioners. The public defines, in very general terms, the roles and functions of its institutions and determines how much it will pay for the defined services, leaving to the professional practitioners the responsibility for determining just how those services can best be provided. For example, the public has defined the functions, at least in part, of hospitals and other medical institutions as healing the sick and injured, caring for the chronically ill, and easing the pain and trauma of the terminally ill. The physicians, nurses, and other trained personnel, however, are responsible for applying their expertise as best they see fit in pursuing the socially defined goals. The untrained lay-person who attempts to dictate modes of treatment to the professionals risks not only losing the services of the experts but also the catastrophic consequences which may result from ignorance and short-sighted expediency.

The same is true for a university. The public has defined several roles of the state university very clearly. For example, it is quite clear that one function of the state university is instructing students for more effective lives as persons, citizens, and workers. Another clearly defined function, although less well recognized by the public at large, is developing new knowledge, research in all fields of human endeavor and interest. A third function, defined in part by law for land grant institutions, is transmitting new knowledge--and indeed "old" knowledge--to the public through various forms of community service. A fourth and somewhat less acknowledged function is that of social critic: observing the society which supports it, warning of developing problems, proposing solutions, anticipating consequences, and stimulating public discussion which could lead to effective social action. These functions the university may not refuse to undertake if it is to discharge faithfully its responsibility to the society which created it and supports it.

Some of these functions, however, call for a high degree of expertise if they are to be effectively delivered. It would be impossible for the average lay citizen, even a legislator, to decide what kind and how large a telescope is needed by an astronomer, whether the expenditure for the telescope has higher or lower priority than a computer laboratory for the mathematics department, or what constitutes a work-load for a home demonstration agent. The questions at issue are too complex to be decided by those far removed from the implementation of the decisions, even by an executive agency of State government or by

the legislature. Indeed, good management practices call for many such decisions being delegated to program administrators at the level of college, department or research unit. Only through such delegation can programs remain flexible enough to permit the university to fulfill its social missions effectively and efficiently.

In addition to the problems of effective decision making, there is the matter of academic freedom necessary for the university to carry out its tasks of instruction and research. Many subjects which are appropriate matters for investigation and study are highly controversial and arouse public antagonism. Although these matters may be of great importance to the well-being of the society, students and faculty members have been threatened and even dismissed for daring to investigate and learn about socially unpopular points of view. The concept of academic freedom was devised to protect the socially valuable functions of instruction and research from being circumscribed with boundaries which may be actually detrimental to the society. To deny the university community the freedom to explore the controversial may be denying the society the opportunity to find the best solutions to its problems. For this reason, the university has a special need for enough autonomy to preclude partisan interference with its missions of instruction and research.

Perhaps the most sensitive university role is acting as the conscience or critic of the society. No one, not even a society, likes to have attention called to its "warts," even when those blemishes might prove to be cancerous. But it must be the duty of the university to challenge the society when it is being false to its basic values, to point out the injustices and contradictions in public policies and practices, to uncover the evils hidden in the dark corners of institutions. This often unpleasant role brings down the wrath of the society, threatening the support, even the existence of the university, the messenger that brings the bad news. Once again there is a need for a guarantee of autonomy which can assure the continuing service of the university to its public, however disturbing that service may be to certain segments of the society.

This autonomy issue was behind a 1982 study of the Carnegie Foundation for the Advancement of Teaching. The "central" question of the survey report was:

How can colleges and universities that are increasingly in the nation's service sustain their traditions of self-control while being accountable to the various constituencies they serve? (Carnegie Foundation for the Advancement of Teaching, p. 4)

The report goes on to acknowledge that universities do not "carry on their work in isolation" and that there is, "in the strictest sense, no such thing as autonomy on campus." Universities are "answerable to the people who support them and cannot be excused from explaining, and perhaps defending, what they do."

However, maintaining the integrity of higher learning is absolutely critical if society is to be well served. The university is a unique institution, a repository of our cultural heritage and a source of the nation's future intellectual and economic growth. Therefore, the academy

must be free to direct, without outside interference, those functions that may, from time to time, challenge, but ultimately will enrich, the culture they sustain. (Ibid.)

Although at first glance the need for autonomy may appear to be contradictory to the responsibility for accountability to the society, the contrary may be true. In the present governance of public universities there is so much confusion over who is responsible for what that it is very difficult to determine accountability. One first step in making the universities accountable is to grant them the autonomy necessary, not only to preserve their freedom, but also to hold them responsible for decisions affecting program, budget, personnel actions etc. As things stand in many States, it is possible to "pass the buck," to engage in "finger-pointing," accusing other agencies and individuals for the inefficiency and ineffectiveness of university operation. There needs to be some way to say--and mean--"the buck stops here."

Once a university gains the requisite independence from other agencies of government to assure its ability to carry out its assigned social missions effectively, the operating components of the university--such as major campus units, colleges, departments, and research units--should be delegated the authority to make those decisions which are appropriate to the conduct of their assigned roles. Only when such authority and autonomy has been granted can those components be held accountable for the successes or failures of their missions, for the effective management or ineffective waste of public resources allotted to them.

(For more on university autonomy and social accountability, see Paul Dressel, THE AUTONOMY OF PUBLIC COLLEGES, Jossey-Bass, 1980.)

#### THE LAY GOVERNING BOARD IS THE AMERICAN SOLUTION TO THE DILEMMA OF UNIVERSITY AUTONOMY VERSUS SOCIAL ACCOUNTABILITY.

There can be no denying that there is--and should be--a political aspect to the governance of a state university. It is through the political process that the public defines what it believes the university's role to be and specifies how much it is willing to pay for the institution's services. The danger is when the political process becomes too responsive to narrow special interests or too beholden to particular political parties and officials. When a governor or a legislature can dictate the details of a university program, specify who may or may not teach, what students may or may not study, or what problems may or may not be researched or criticized, then the university cannot be expected to serve its society most effectively.

The American compromise to this dilemma of university autonomy versus social accountability is the lay board governing the university. Although historically the first governing boards were to assure the orthodoxy of the early colonial colleges, they have evolved as the nation has moved toward greater democracy in government. Many authorities who have studied and written about the role of lay boards governing public universities have included as one board function that of being both a bridge and a barrier or buffer between the university and the society. The "bridge" role assures the accountability of the university to the society. The "barrier"

re : assures that the university will be insulated from those pressures which would interfere with its proper functions of instruction, research, community service, and social critic.

Since 1900 scholars and administrators of higher education have published more than fifty books, articles, and monographs about the roles and functions of boards governing public universities. In the last twenty-five years all such studies have either stated or assumed there is a need and appropriate roles for governing boards. A survey conducted among University of Hawaii Regents and former Regents brought only one negative judgment about the need for a governing board and many positive statements about its important functions from the remaining 47 who responded to the survey. (Potter, pp. 131-2.)

#### GOVERNING BOARDS SERVE A USEFUL PURPOSE IN UNIVERSITY GOVERNANCE.

James Perkins, former Cornell University president and board chairman of the International Council for Education Development, edited a 1973 report on THE UNIVERSITY AS AN ORGANIZATION. In the chapter on "Conflicting Responsibilities of Governing Boards," Perkins wrote that the board is "the supreme legal authority for the university community." It is this legal authority which underlies the general assumption that governing boards do serve a necessary purpose in governing universities. (Perkins, p. 206)

In Hawaii one proposal that has sometimes been made is that the active involvement of the Legislature fulfills the role that boards are supposed to assume. A study funded by the Ford Foundation for the Advancement of Education in 1957 specifically rejected this kind of suggestion. The Committee on Government and Higher Education, chaired by Milton S. Eisenhower, then president of Johns Hopkins University, reported that "occasionally it is asked whether a legislative committee or some other state agency could not take over the task of representing the public interest in the government of state colleges and universities." The committee report strongly favored retaining governing boards as the means to "harmonize the freedom of higher education with the responsiveness to the public interest."

The distinctive characteristic of the board . . . is that . . . it provides for continuous, experienced, and perceptive scrutiny of higher education by members of the community who are brought into the university family by their role as trustees. Regents are thus in a position to view the operations of institutions of higher education at close range and to pass judgment on educational policy with intimate awareness of the complexity of the issues involved. This is a vantage point no other state agency has, and it is a function no other state agency can perform. (Moos and Rourke, pp. 310-312.)

A similar conclusion was expressed by the 1973 Carnegie Commission on Higher Education report on GOVERNANCE OF HIGHER EDUCATION, which defended governing boards as "an essential institution in higher education" because "no other mechanism can provide governance so well," particularly "not the state." (Carnegie, 1973, p. 32.)

John J. Corson, a trustee of one public and three private institutions of higher education and author of several books on the governance of higher education, wrote in 1973:

The lay board of trustees for the public college or university should not be abandoned. . . . The objective, dispassionate monitoring, surveillance, question-asking function . . . can best be done by lay board members. (Corson, 1973, pp. 10-11.)

The one University of Hawaii Regent who questioned the need for the Board of Regents was Stuart Ho, who served as Regent from 1971 to 1974 and later was a State legislator. In responding to the survey questionnaire, Ho commented:

Particularly in a case such as ours where virtually all funding is derived from tax revenues, . . . the Board . . . should be eliminated by Constitutional amendment. They take up space; they do not prevent the politicization of the campus; and the administration takes up an extraordinarily large amount of time catering to their whims. (Potter, pp. 131-132.)

The other forty-seven Regents who responded to the survey questionnaire on the functions of the Board clearly assumed that it had a distinctly valuable role to play in University governance. Fourteen specifically mentioned Board involvement with long-range planning and major changes in the mission of the University. Stanley Mukai, who has been on the Board since 1979, wrote at length of the many responsibilities of the Board, noting that the "university is a complex organization requiring active involvement by the governing board." (Potter, p. 134.)

#### BOARDS PROVIDE A MECHANISM FOR SOCIAL ACCOUNTABILITY.

Many of the studies discussed the relationship of the governing board to the larger community, pointing out the need for accounting to the public for meeting social needs and assuring proper expenditure of appropriations.

In a 1959 study of 519 boards governing public universities and colleges, Martorana and Hollis reported that the board's "chief responsibility" is "determining what the image of the institution governed is to be." Boards must not only maintain a "sense of direction and balance in institutional offerings consistent with educational purpose," but must encourage "change in institutional offerings as conditions change." (Martorana and Hollis, 1963, pp. 80-88.)

In its 1973 report on GOVERNANCE OF HIGHER EDUCATION, the Carnegie Commission listed among the functions of the board:

it defines the purposes to be followed and the standards to be met; it is the guardian of the mission of the campus; it evaluates overall performance. . . .

It is an "agent of change." (Carnegie, 1973, pp. 32-33.)

Corson, in his 1975 revision of his book THE GOVERNANCE OF COLLEGES AND UNIVERSITIES, called upon boards to "define the objectives of the institution and ensure the consistent pursuit of those objectives." (Corson, 1975, p. 265.)

University of Hawaii Regent Wallace Fujiyama (1974-1982) wrote of the difficulty of getting "the administration and

faculty to change their views from what they have been doing for years to one that will meet the needs of the community today." He said that one "important task was to readjust the goals of the University to keep pace with the country and the world at large and with the ever-changing needs of society." (Potter, p. 137.)

Another aspect of accountability is in the assurance to the public that appropriated funds had been properly spent. That concern was explicit in many of the studies. The Committee on Government and Higher Education, set up in 1957 by the Ford Foundation for the Advancement of Education, concluded that one legal duty of the governing board is "quite clear."

It is to insure that the funds appropriated by the state are managed in as wise and frugal a manner as possible and with responsiveness to the long-range needs of the people in the state. (Moos and Rourke, p. 306.)

Several UH Regents made the same point. Mukai described it as "assuring the community of prudent and efficient use of their tax dollars." Kenneth Kato, who joined the Board in 1982, wrote: The Board is entrusted by the general public to see that the State gets its "money's worth" for the tax dollars it spends. The Board, in this role, should insist that the University be responsible and accountable to the citizens who provide the necessary funds to carry out the University's mission goals and activities. (Potter, p. 140.)

Making sure that the public gets its "money's worth" may involve the difficult decisions of determining "which programs should be expanded, remain the same, or die," as Regent Roger Evans (1974-1975) put it. (Ibid., p. 140.) Having the authority for such decisions, particularly in a University complex involving a number of campuses, requires that the board have the responsibility and the authority to make allocations among programs. John Hoag (1974-1977) argued for greater control of the budget by the Board if it is to be able to be accountable to the public for getting the full value of tax dollars appropriated.

The Board should have control of an overall budget allocation from the Legislature, to approve in consultation with the administration, rather than having the direct budget control on line items done by the Legislature. (Ibid., p. 137.)

#### BOARDS SERVE AS 'BUFFERS' AGAINST IMPROPER OUTSIDE INTERFERENCE.

The purpose of institutional autonomy and independence is to assure that the university will have the freedom and flexibility to carry out its missions effectively and efficiently. Layers of bureaucracy, particularly those outside of the institution, interfere with the efficient operation of the university and sometimes even meddle with the socially essential freedom to study and learn about matters which some persons consider to be controversial. It is this kind of concern which underlies the frequent reference to the board as a "barrier" or "buffer."

In their 1959 study, Martorana and Hollis listed as one of the key responsibilities of the board that of preserving "the values of freedom in instruction, research, and service and of

faculty involvement in development of policies in these realms."

The board of trustees must stand behind the competent scholar who is doing his job well, even in the face of controversy and public examination. (Martorana and Hollis, 1963, p. 83.)

Jerome Byrne, in a 1965 study for the University of California regents, included as one of the seven "basic roles and functions of the Regents," protecting the "university commonwealth from unwarranted attack as it carries out its purpose." (Byrne, p. 84.)

The 1966 joint "Statement on Government of Colleges and Universities" issued by the American Association of University Professors, the Association of Governing Boards of Universities and Colleges, and the American Council on Education, related this role to its social significance.

When ignorance or ill-will threatens the institution or any part of it, the governing board must be available for support. In grave crises, it will be expected to serve as a champion. . . . The board should make clear that the protection it offers to an individual or a group is, in fact, a fundamental defense of the vested interests of society in the educational institution. (Statement on Government of Colleges and Universities, p. 378.)

When the Carnegie Commission on Higher Education published its 1973 report on GOVERNANCE OF HIGHER EDUCATION, it listed as one of the governing board's six functions:

It acts as a "buffer" between the society and the campus, resisting improper external interference and introducing a necessary contact with the changing realities of the surrounding society; it is the principal gatekeeper for the campus, and its judgment about what is improper interference on the one hand, and what is constructive adjustment on the other, is of the utmost importance to the conduct of the institution. (Carnegie, 1973, p. 32.)

Among the appendices of that report is a statement of the American Academy of Arts and Sciences on university goals and governance. That statement charges that boards themselves violate the very academic freedom which they should protect.

Boards of trustees have often been effective buffers against political and other pressures directed at colleges and universities. Today, however, boards are sometimes the conduits of these pressures, serving only to exacerbate already difficult situations. The buffer role ought to be reinforced, particularly in those state institutions where political pressures are especially strong. (Carnegie, 1973, p. 138.)

This statement is particularly noteworthy in States like Hawaii where boards lack enough autonomy to resist the political pressure of a legislature or governor.

Louis Heilbron, himself a trustee, wrote a book "for trustees, by a trustee." He recommended to fellow trustees that

The board must protect the university against those who would weaken it from without . . . by restricting its freedom to pursue the truth, and by shifting too much

power to political centers. It must defend the university against those who would try to weaken it . . . and to reconstitute it to serve political purposes. (Heilbron, p. 224.)

President James Perkins pointed out that in order for the board to be the "protector of the academic community from the incursions of hostile societal interests," it must be assured of "independence of a particular governor or legislature." (Perkins, pp. 208-209.)

This warning echoed an early statement by J. W. Fesler, president of the Association of Governing Boards of State Universities and Allied Institutions in 1924 and regent of Indiana University for some twenty-two years. As president of the AGB, he took a strong stand against political interference.

The highest development of the University is not possible under political control, personal or partisan, and whenever the effort toward such control becomes apparent on the part of any group, or, indeed, upon the part of the appointing power, it is the duty of the governing board to block it, even if such action involves direct conflict with the appointing power. (Fesler, p. 63.)

In a 1935 address to the Conference of Trustees of Colleges and Universities, Chancellor Emeritus Samuel P. Capen of the University of Buffalo asked:

Who . . . should interpret and defend academic freedom? I believe the interpretation and defense should be a joint responsibility of faculty, president, and trustees. The responsibility of trustees in this matter is no less than that of the other two partners in the management of higher institutions. . . . In a legal sense the responsibility is all theirs, to be delegated if they choose, but not to be vacated. (Capen, pp. 31-32.)

Raymond Hughes, who served not only as president of Miami University and Iowa State University but also as trustee of the Presbyterian Theological Seminary of Chicago, published A MANUAL FOR TRUSTEES OF COLLEGES AND UNIVERSITIES in 1951. In it he took a stance similar to that of Fesler:

In state institutions a governor is often tempted to interfere in the operation of the institution. He has no authority or right to influence the institution in any way except as he nominates trustees. Should he suggest anything along other lines, the president of the board should be ready and able to fully defend the independence of the board. (Hughes, 1951, p. 8.)

In a statement which is particularly relevant to the University of Hawaii and its Board of Regents in their relationship to the political forces of the State, Samuel B. Gould, Chancellor Emeritus of the State University of New York, also warned that when trustees are "unduly sensitive . . . to the political figures or bodies responsible for their appointment," they "vitate their contributions to the progress of the university's integrity" by allowing "it to be compromised by their own lack of independence." He called upon governing boards to "insist upon" independence for themselves and the

university, "regardless of political affiliations, professional loyalties or predilections, ethnic or religious ties." (Perkins, pp.222-223.)

UH Regents have been sensitive of their role as a buffer. As a matter of fact, in the survey on the functions of the BOR sent to present and former Regents, nine actually used the word "buffer" in describing the function they thought the BOR should serve. Herbert Cornuelle wrote that one of the major tasks of the BOR during his term (1961-63) as chairman was to "establish the independence of the University--preserve and regain the initiative of the University," and that the BOR should "establish a climate within which the administration and faculty can run the U. (serve as a buffer.)" (Potter, p. 143. Parentheses in Cornuelle's statement.)

Arthur D. Lewis, who was president of Hawaiian Airlines during his term on the BOR (1961-64), in responding to the questionnaire said the Board should "act as a buffer between the school and elements in the community which would attempt to circumscribe or limit its freedom to become the intellectual leader it should be." (Ibid., p. 143.)

Similar statements came from Richard Penhallow (1949-61), who charged the BOR with the "absorption of and reaction to political and popular pressure;" Robert Cushing (1967-74), who reported one of the tasks of the BOR was "coping with the various elements in the community who thought they should 'run' the University;" and George McPherson (1963-68), who wrote bluntly, "Fending off the Mickey Mousers--Lions, Kiwanis, Rotarians, etc." Harold Richelberger (1968-74) saw the role of "bridge" and "buffer" as two sides of the same coin:

Aid and assist in better understanding between "public" and "university" sectors, shielding the university system from special interest group pressures by giving them an opportunity to be heard. (Ibid., pp. 143-144.)

A visiting professor of geography, himself a former member of the governing board of an Australian university, wrote a strongly worded commentary to the HONOLULU ADVERTISER at the end of his 1974-75 stay at the Manoa campus. Charging that the "basic problem" in governance for the University of Hawaii was the "overinvolvement of State politicians and bureaucrats, and the insufficient involvement of independent members of the community and of the University's scholars and students, in the formulation of University policy," he advocated governance by boards which resemble those of universities in other nations, where some members are elected by students, faculty, and graduates to complement those appointed by the government. His special concern, however, was the interference with the UH administration by executive agencies of the State government.

The close ties between University and State are perilously to those existing in countries with authoritarian regimes, but rarely found in democracies. . . .

The increasing financial involvement of the State is often used as a justification for close State supervision of all aspects of University affairs. Such close supervision is self-defeating; the more the state interferes, the less society as a whole gets for its money. In my

home country of Australia, . . . the financial dependence of universities on the government is far greater than in Hawaii, but this has not led to any erosion of the autonomy which universities have traditionally maintained.

Free societies usually place great value upon the freedom of their universities, and recognize that even state-financed universities must have a measure of independence from state interference. The University of Hawaii must be granted this independence if it is to fulfill its proper role in your community. (Holmes, p. A-13.)

The MANAGEMENT AUDIT OF THE UNIVERSITY OF HAWAII done by the Legislative Auditor of the State of Hawaii in 1981 included as one of the functions of a governing board that of "preserving institutional independence." (Leg. Auditor, 1981, p. 57.)

From all sources there is the clear expression that to be an effective social institution a university must possess a high degree of autonomy and that the appropriate means for assuring accountability to the public is through an independent governing board. Hawaii has the means for achieving that independence for its university and governing board through implementing the 1978 constitutional amendment which grants the BOR "exclusive jurisdiction over the internal organization and management of the university."

SOME STATES PROVIDE GOVERNING BOARDS AUTONOMY IN ORDER TO ENABLE THEM TO PROTECT THE FREEDOM OF THE UNIVERSITY WHILE MAINTAINING SOME MEASURE OF ACCOUNTABILITY.

The autonomy of governing boards can be defined either by constitutional provision or by statute. Nine States--California, Colorado, Georgia, Idaho, Michigan, Minnesota, Montana, Nebraska, and Oklahoma have written autonomy for their governing boards into the State constitution "like a bill of rights."

The California Constitution, Article 9, Section 9, for example, delegates to the regents the "full powers of organization and government" of the University system, and provides that the campuses of the University "shall be entirely independent of all political and sectarian influence and kept free therefrom in the appointment of its regents and in the administration of its affairs." (Moos, 52-3.)

A number of judicial opinions of California courts as well as by the California Attorney General treat the University as a "fourth branch of state government . . . 'equal and coordinate with the legislative, the judiciary, and the executive.'" (Horowitz, 27.)

Among the States which give the State university governing board autonomy by statute is Maryland.

In Maryland, the "Autonomy Act" of 1952 gave the Board of Regents the full responsibility and power of management and said that, with cited exceptions, the Board should not be superseded by any other Maryland bureau, agency, department, or commission. The act was amended slightly in 1976 and 1978, but

the State of Maryland still recognizes its state university as being unusual among state agencies. (Ibid., 53.)

The report on THE POST-LAND GRANT UNIVERSITY concluded that those States "which have given their major public universities autonomy have generally produced higher quality in those institutions."

What these institutions have in common is . . . the freedom to develop programs and manage their own affairs with a minimum of interference. (Ibid., 34.)

The report listed three reasons for concluding that "autonomy has aided the development of quality at public institutions which have been granted operational freedom." The first was that "autonomous institutions attract better leaders, because those persons want leadership opportunities provided by "more operating room to make decisions and determine directions."

Second, the absence of demands for detailed accounting and accountability creates a freer, more open atmosphere in the entire institution, and this atmosphere itself is more conducive to scholarly research and discovery.

Third, the absence of external "energy sinks"--excessive external accounting is certainly a time "drain"--leaves persons throughout the organization more free to concentrate on the future instead of defending the past. (Ibid., p. 35.)

It takes more than a constitutional provision, however, for a university to gain the autonomy and "operational freedom" necessary for developing into an institution of high quality. Leonard Goodall, after a study of constitutional provisions for higher education in the United States, concluded that "there is no close correlation between a state's constitutional provisions on higher education and the quality of its colleges and universities." (Goodall, p. 8.) The constitutional provision must be translated into statutes and administrative practices if the university is to achieve the independence essential to assure academic freedom for both faculty and students and freedom of inquiry in research and scholarly activities which characterize a university of the highest quality. (Ibid., p. 3.)

The impetus for this translation of constitutional rhetoric into administrative practice may come through legislative enactment, through executive direction, or through court decision. As long as both the legislatures and the governors hold the power to dictate to their State universities, it is not likely that change will come through them. In a number of States it has been the courts which have been the medium for implementing the constitutional autonomy of the university.

#### THE QUESTION OF THE POWER OF THE BOARD OF REGENTS HAS ARISEN AT EACH OF THE HAWAII CONSTITUTIONAL CONVENTIONS.

By passing Act 24 in 1907, the Territorial Legislature created the Board of Regents of the College of Agriculture and Mechanic Arts of the Territory of Hawaii. In 1911, the name of the institution was changed to the College of Hawaii and again in 1919 to the University of Hawaii. Act 24 defined the powers of

the Regents imprecisely except for the right to acquire property and expend funds.

Section 3. The Board of Regents shall have the general management and control of the affairs of the College. They shall have power to purchase or otherwise acquire lands, buildings, appliances and other property for the purpose of the college, and expend such sums of money as may be from time to time placed at the disposal of the college from whatever source. (SESSION LAWS, 1907, Act 24.)

In 1909, the Legislature granted the Regents the power to "appoint a treasurer and other such officers as they deem necessary." The 1911 Legislature authorized the Regents to accept Federal funds and the conditions under which those funds were appropriated. The power to receive and manage gifts to the University was granted to the Board in 1925, and in 1932, the Board was directed by the Legislature to charge a tuition fee. These references to the powers of the Board were all that had been included in the statutes up to the time of the first Constitutional Convention. (Potter, pp. 90, 96-97.)

THE 1950 CONSTITUTIONAL CONVENTION CREATED THE UNIVERSITY AS A BODY CORPORATE.

The Constitutional Convention of Hawaii held in 1950 in preparation for statehood included in the article on education two sections dealing with the University. Standing Committee Report No. 52 explained the basic reasoning for the section dealing with the powers of the Board of Regents.

The Board of Regents of the University of Hawaii is herein created a body corporate for the purpose of giving it such legal continuity and corporate powers that it can better handle the financial affairs of the University. (PROCEEDINGS, 1950, vol. I, p. 204.)

The committee report noted that the University administration had sought autonomy from the fiscal control of the forerunner of the present Department of Budget and Finance.

The University authority also presented to your Committee the problem of financial control. Data were presented which indicated that in all but two of the State Universities, the boards of regents have unrestricted control over funds appropriated for university expenditures. In the present Territorial set-up the Bureau of the Budget exercises certain controls over the Board of Regents. Your Committee felt that this problem is one faced by other departments of government as well as the University and that it should properly be referred by the University to the Committee on Taxation and Finance for consideration as to general fiscal policy, or be presented to the legislature for consideration and action. (Ibid., p. 205.)

The referral to Taxation and Finance was apparently never made, and no further comment is contained in the PROCEEDINGS about the specific issue of autonomous fiscal control.

The wording of the Section dealing with the powers of the board was, however, stronger in the Committee's Proposal than was

finally adopted. The Committee's Proposal read:

The Board of Regents shall be empowered to establish policy and to exercise full control over the University of Hawaii through its executive officer, the president of the university, who shall be appointed by the board. The Board of Regents of the University of Hawaii shall constitute a body corporate.

Meeting as a Committee of the Whole, the Convention amended that section to insert the words "in accordance with law" to "make clear that educational policy adopted by the board must not be contrary to law" and deleted the word "full" in the phrase "to exercise full control" as being "unnecessary." (Ibid., pp. 316-7.)

After a very long debate extending over two sessions, the reference to the board being a "body corporate" was amended to read that the University was "constituted a body corporate." (Ibid., pp. 608-617.) The Committee on Style revised the wording of Sections 4 and 5, but left the intent of the Article as it had been amended on the floor of the Convention. (Ibid., p. 265.) Thus, Section 4 read:

The University of Hawaii is hereby established as the state university and constituted a body corporate. It shall have title to all real and personal property now or hereafter set aside or conveyed to it, which shall be held in public trust for its purposes, to be administered and disposed of according to law.

Section 5, which defined the Board of Regents, concluded with a sentence which described the powers of the board.

The board shall have power, in accordance with law, to formulate policy, and to exercise control over the university through its executive officer, the president of the university, who shall be appointed by the board. (Ibid., Vol. I, p. 265.)

The portions of these sections quoted above remained unchanged until the 1978 Constitutional Convention.

#### PREPARATION FOR THE 1968 CONVENTION INCLUDED A STUDY OF UNIVERSITY INDEPENDENCE.

In preparation for the second Constitutional Convention to be held in 1968, the Legislative Reference Bureau did a number of studies, including one on education. After detailing the constitutional provisions of other States for establishing a State university, the report noted as two reasons for constitutional provision the following:

3. The sanction of both constitutional recognition and independence is probably a large factor in the development of outstanding universities such as the University of California.

5. Constitutional status helps safeguard the institutions of higher learning from possible ill-advised action of an occasional few individuals in legislative and executive ranks.

Among arguments against constitutional status, the report listed:

1. All public funds should be authorized, appropriated

and supervised in expenditure, by the legislature.  
2. Under constitutional status, institutions tend to develop their scope of activities without adequate review of the legislature. (Kim, Vol. II, pp. 6-7.)

The LRB report then noted that four States, (Alaska, California, Louisiana, and Hawaii through its 1959 Constitution) had constituted their universities as legal corporations. This wording was considered highly significant in defining the autonomy of the institution.

Many would interpret the granting of corporate status to a university as the highest achievement and fullest recognition of the independence of higher education. It is an acknowledgement of the freedom for objective inquiry necessary for an institution of higher education . . . charged with the revision and creation of knowledge in its research activities. (Ibid., p. 8)

The report then quoted Lloyd Morey, one-time president of the University of Illinois, who had written: "If state-supported education is to function with full educational effectiveness, it must be entirely free from supervision or domination by state political agencies." (Ibid., p. 9. Quoting Lloyd Morey, THE STATE-SUPPORTED UNIVERSITY, Carbondale, Ill.: Southern Illinois University Press, 1961, p. 29.) Two other quotations on the question of university autonomy were taken from studies done for the Committee on Government and Higher Education under funding from the Ford Foundation for the Advancement of Education.

"Whatever constitutions may allow, the common understanding seems to demand that higher education be granted administrative as well as academic freedom. It is believed that governing boards can only operate effectively where they are left with a substantial degree of autonomous control over the affairs of the university." (Ibid., p. 9. Quoting Malcolm Moos and F. E. Rourke, THE CAMPUS AND THE STATE, Baltimore: Johns Hopkins Press, 1959, p. 37.)

"When either bureaucracy or partisanship infringes upon the authority of the governing board, it thereby threatens both the intellectual and institutional independence of the institution. Intellectual freedom may suffer seriously if public colleges and universities are subjected to the same controls as other state activities. Conversely, protecting the authority of boards of lay trustees from interference by the state is every bit as vital to the freedom of the university as is the preservation of freedom for teaching and research." (Ibid., p. 9. Quoting from Committee on Government and Higher Education, THE EFFICIENCY OF FREEDOM, Johns Hopkins University Press, 1959, p. 6.)

Summing up the significance of these quotations as justifying the provision of corporate status of the university, the LRB report likened the State university to a "fourth branch of government."

Some authorities maintain that constitutionally granted corporate status virtually establishes higher education as a fourth branch of government. . . . In those states . . . , the public university holds coor-

dinate status with the legislature, the executive and judiciary. It is subject to legal control by these other branches only insofar as it seeks their assistance in attempting to attain its own objectives, as when it requests financial aid in the way of appropriations from the legislature. (Ibid., p. 9.)

Later in clarifying the relationships among the branches of government, the report stipulated that the governor (via the budget office) and the legislature

have clear authority to decide the initial question of what portion of the state's economic resources should be committed to higher education. Such a decision is deemed a political one, and . . . must be made by elected representatives in response to public will. However, . . . the expenditures and internal allocation of state funds once they have been appropriated . . . should be the responsibility of the university and thereby it can be held accountable for the use of these public funds in meeting the academic goals of the institution. (Ibid., p. 16.)

#### PROPOSALS IN THE 1968 CONVENTION WHICH WOULD HAVE LIMITED THE POWER OF THE BOARD OF REGENTS WERE NOT ADOPTED.

At the 1968 Constitutional Convention, for which the LRB report had been prepared, there was little discussion of the BOR. Delegate Diana Hansen introduced proposal 161, which would have given the BOR "complete supervision, control and direction of all expenditures from the institution's funds." The proposal would have vested "complete accountability and responsibility for such powers with the board." (PROCEEDINGS, 1968, Vol. I, pp. 28, 395.) The important new concepts in this proposal are embodied in the repeated word "complete" and in the reference to "all expenditures." (Emphasis added.)

Del. Emilio S. Alcon introduced proposal 227, which would have established a department of education as a "principal department headed by a superintendent appointed by the governor." The proposal would have granted to the superintendent "power to formulate policy and exercise control over the public educational institutions of the State, including the universities, four year colleges and community colleges." It also would have established a board of regents with power to "formulate policy and exercise control over the university within the framework of the superintendent of education, through its administrative officer, the president of the university, who shall be appointed by the board and serve as its secretary." (Ibid., pp. 39, 400.) Two other proposals (275 and 277) introduced by Del. Richard M. Kageyama were similar to that proposed by Alcon. (Ibid., I, pp. 47, 404.) These three proposals appear to have been intended to promote coordination among the educational institutions, but had they been adopted they would very certainly have resulted in less freedom and independence for the University.

Standing Committee Report No. 41 mentioned that these four proposals were referred to the Committee on Public Health, Education and Welfare, but there is no further mention of any of

them in the committee report (Ibid., I, pp. 203-206). No other proposals were submitted which were directly related to the powers of the Regents (Ibid., I, pp. 387-409) nor was any reference made to the powers of the Regents or the independence of the University in the Committee of the Whole debates over Article IX. (Ibid., Vol. II, pp. 430-453.) The fact that these proposals were not adopted or even debated is an indication that delegates did not intend to limit further the independence of the University and its governing board.

**THE 1978 CONSTITUTIONAL CONVENTION GRANTED THE REGENTS "EXCLUSIVE JURISDICTION OVER THE INTERNAL ORGANIZATION AND MANAGEMENT OF THE UNIVERSITY."**

Prior to the 1978 Constitutional Convention, the Faculty Senate of the University of Hawaii at Manoa appointed a Faculty Commission on Constitutional Alternatives for the University of Hawaii. The Commission had some twenty members drawn from a wide range of academic departments, including the Law School and the Political Science Department, and met twice a month during the 1976-77 academic year. One of the conclusions adopted by the commission on May 2, 1977, was that there was a

need for further inquiry into the place of the University of Hawaii in the executive structure of the state and into the question whether the University should be treated like other state departments or instead should have greater autonomy. (Faculty Senate Minutes, 1 Feb. 1978.)

This conclusion was based on the consensus of Commission members that the UH "ought not to be treated like any other executive department, because of the University's unique mission and our need for insulation from the day-to-day political controversies." (Faculty Commission, p. 1.)

The Commission made a lengthy report (58 pages, including appendices) to the Faculty Senate in December 1977. Although the Senate concurred with the report's conclusions, all discussion and resolutions centered on faculty representation on the BOR and the question of autonomy for the University was entirely ignored. (Faculty Senate Minutes, 1 Feb., 12 April, 10 May 1978.)

During the spring of 1978, a number of "pre-Con-Con" public forums were held. At two of these forums, held at Hawaii Loa College and Maui Community College, panels discussed possible amendments to the article on education. Robert Potter, UH-Manoa professor, spoke on the need to assure the autonomy and independence of the UH, if it were to be effective as a "fourth branch of government responsible for social criticism" as well as instruction, research, and community service. The sensitive nature of these roles demands protection of the institution from partisan political intervention and undue social pressure. (Personal recollection.)

In preparing for the Convention, the LRB produced sixteen volumes of studies, presenting in "understandable form many of the possible issues and the arguments on both sides of such issues that the delegates . . . may wish to consider." (Legislative Reference Bureau, 1978, INTRODUCTION AND ARTICLE SUMMARIES, p. 1.) One volume covered Article IX, Education, and a large

portion of that volume dealt with issues in higher education, particularly autonomy and corporate status of the UH. The findings of the LRB in these areas are of particular significance in understanding the intent of the 1978 Convention when it proposed the amendment granting the BOR "exclusive jurisdiction over the internal organization and management of the university."

In the section on the constitutional provision for higher education, the LRB analysis began with the assumed need for institutional independence.

The acknowledged importance of colleges and universities, and a recognition of the need for intellectual freedom and objectivity, have resulted in a traditional autonomy for these institutions. Both custom and law have assigned a wide measure of independence to them. Autonomy has been provided by establishing a system of higher education and entrusting the responsibility for university affairs to governing boards of laypersons. (LRB, Article IX, p. 101.)

The report stressed the importance for constitutional recognition of higher education.

Universities and colleges are then free to . . . develop programs in the "public interest" without fear of interference from other branches of government, since constitutional recognition of higher education grants the university and college some degree of independence from legislative and executive controls. In addition, constitutional recognition of governing boards increases board responsibility for financial and policy obligations. (Ibid., p. 102.)

The report pointed out that, although many States have recognized higher educational in their constitutions, "only a few . . . have conferred an autonomous constitutional status on one or more of their universities." Those constitutions which vest "almost exclusive powers of governance, control and management in the governing boards" treat the universities "as the fourth branch of government, coequal with the legislative, executive and judicial branches." (Ibid., p. 104.)

One means of providing institutional autonomy is through corporate status for the university or its governing board. The LRB study acknowledged that possibility, quoting a 1964 article on State universities.

Granting of corporate status is a method of providing autonomy to institutions of higher education. Corporate status acknowledges the university as "a legal entity . . . vested with the capacity . . . of acting as a unit in matters relating to the common purpose of the association, within the scope of the powers and authorities conferred upon such bodies by law." (Ibid., p. 104. Quoting Frederic Heimberger, "The State Universities," DAEDALUS, Fall, 1964, p. 1105.)

Noting that the State Constitution conferred corporate status on the UH, the LRB study concluded that such constitutional provision freed the UH from "outside controls" and provided it "with autonomy in its internal governance, control, and management." (Ibid., INTRODUCTION, p. 173.) The study also

quoted an interpretation of this constitutional provision made by the Attorney General of Hawaii, who found "that the university is a constitutionally autonomous body and not an administrative or executive agency of the state." (Ibid., IX, p. 105.)

The LRB study pointed out, however, that, in spite of the corporate status of the UH and the opinion of the Attorney General, the autonomy of the UH was very much limited by the legislature and the executive departments of the State government. The phrase "in accordance with law" which circumscribes the power of the Regents, as defined by the State Constitution, means that "the final authority over decisions made by the board rests upon the law-making body, the state legislature." (Ibid., p. 112.)

The legislature, in addition to fiscal control over the university, also initiates legislation regarding various phases of higher education. Although it is often responding to the wishes of the public, the legislature, through the enactment of education laws, is able to control the input of ideas to universities and colleges. (Ibid., p. 106.)

Similarly, the executive branch of State government has played a major role in governing the University.

Since the 1920's the influence of the governor has also been increasing with the creation of executive line agencies vested with administrative powers and controls overlapping those of the university. Hawaii's budget office has assumed considerable influence in the budgeting process by making final recommendations concerning higher education appropriations for the executive budget and by performing audits of the use of funds. (Ibid., INTRODUCTION, p. 174.)

When the 1978 Constitutional Convention convened, delegates presented thirteen proposals affecting the BOR, most of them having to do with membership on the board. Proposal 3 introduced by Del. Emilio S. Alcon, would have amended Article IX, Section 5 to grant the BOR the "power, in accordance with law, to formulate policy, to adopt rules and regulations without the approval of the governor, and to exercise control over the university through its executive officer, the president of the university." The underlined words were those proposed by Alcon. (Taken from a compilation of delegate proposals in the Hawaiian Collection at Hamilton Library.) This proposal, along with a dozen others, were referred to the Committee on Education, where the procedure was to use the many proposals referred to the Committee as resources for developing the Committee's own proposal. (Interview with John Waihee, June 29, 1983.)

The UH had also presented a proposal to the Committee on Education, which was chaired by Teruo Ihara. According to Ihara, who had recently retired as a professor at the University, the intent of the proposal was "to give the University the freedom to fill positions, close programs, move departments, and take other personnel and program actions without awaiting approval from downtown," referring to the executive agencies of the State government. "The authority was not to go much beyond that," Ihara recalled, noting that "the State's control over the purse

strings gave them some control over programs." (Telephone interview with Ihara, June 2, 1983.)

Several UH administrators and professors were in frequent attendance at the meetings of the Convention and were influential in advancing the interests of the UH. Among them were President Fujio Matsuda, Vice Pres. for Administration Harold Matsumoto, Chancellor Ralph Miwa, and Professors Richard Kosaki and Kenneth Lau. They pointed out the need for the UH to have flexibility to make decisions in regard to academic programs, a point with which most delegates agreed, according to John Waihee. However, Matsumoto recognized that the implementation of academic decisions involved personnel actions and allocation of other resources, in which activities the UH was subject to the review and approval of such executive agencies as the Department of Budget and Finance and the Department of Accounting and General Services. It was apparent in Matsumoto's arguments, according to Waihee, that it was the independence of the UH from these executive agencies which was Matsumoto's concern. (Interview with Waihee, June 29, 1983.) The delays and uncertainty resulting from the interference of the other executive agencies in the corporate authority of the University created a severe barrier to effective decision-making by the Regents and the University administration.

Upon the request of the University, therefore, and with wording drafted by a lawyer from the Convention counsel's staff, the following amendment to Article IX, Section 5 was proposed by the Committee on Education in Standing Committee Report Number 39 and in Committee Proposal Number 6:

Notwithstanding any law relating to the power to formulate policy and to exercise control over the university, the board shall have the exclusive jurisdiction over the internal organization and management of the university. (PROCEEDINGS, 1978, Vol. I, pp. 589 and 591-592.)

In support of this proposed amendment, the Committee on Education reported:

Many people testified before your Committee concerning the governance problems of the University of Hawaii. Some of these problems apparently stem from the conflict between the University of Hawaii's position as a "body corporate," with a separate legal status, which is also subject to general budgetary and other controls of the governor and legislature. It is the intent of your Committee that the board of regents have flexibility in the internal organization and management of the university. . . .

The proposed amendment would not affect the governor's authority over the university in the major areas of . . . the budget-preparation process. In the budget-making process, the governor would continue to review the the university's budget requests before submission to the legislature. Nor would the budget-making process of the legislature be altered. The university would continue to comply with laws passed by the legislature.

The import of the proposed amendment is to make clear that, with respect to matters of internal organization and management, the authority of the board of

regents is complete. Its direction and control may be exercised through its president, exclusive of other agencies of State government. . . .

Among examples of matters which would fall under the exclusive purview of the board of regents, under the proposed amendment, would be the authority to establish or abolish an administrative or program unit, to establish or abolish subordinate offices or positions, and to transfer officers and employees between positions, subject only to the limitations of available appropriations and the provisions of such laws of general application as the civil service and collective bargaining laws. (Ibid., I, p. 590. Underlining added.)

Although the Committee report acknowledged that the degree of autonomy was still limited by the Legislature's responsibility to appropriate funds and by such statutory provisions as those governing civil service employees and collective bargaining, other limitations imposed by executive agencies of State government were expressly included as "matters which would fall under the exclusive purview of the board."

When the proposed amendment was debated in the Committee of the Whole, Ihara said that the committee "agreed that the board of regents should have flexibility in the internal organization and management of the university consistent with the status of a corporate body, which was granted to it in the original 1950 Constitution."

This status was conferred in recognition of the unique role of the university, which differs significantly from other departments and agencies of the state government. . . . This proposed amendment will not detract from the governor's power to set ceilings upon and to review the the university's budget. Neither will the amendment alter in any way the budget appropriation powers of the legislature. The university will also continue to comply with all laws passed by the legislature and signed by the governor. Finally, the power to audit all university management and financial procedures will remain with the executive and legislative branches of the state government.

Ihara concluded his comments on this amendment by arguing that the jurisdiction of the board needed to be clarified "if it is to be effective and especially if it is to be held accountable for its actions." (Ibid., II, p. 171.)

Among those who spoke in support of the amendment (none spoke against it) was Del. John D. Waihee, who argued that it would "reinforce the concept that the University of Hawaii is a body corporate." (Ibid., II, p. 234.) In discussions with Pres. Matsuda, Waihee pointed out that the Attorney General had ruled in 1961 that the corporate status of the UH put it in a category different from other executive agencies. Matsuda, however, responded that the UH still did not have real operational independence and that something was needed to persuade the Legislature and State government to implement the provision that the UH was a "body corporate." On that basis, Waihee spoke in favor of the proposed amendment, which he felt was needed to "clarify

relationships between the University administration and agencies like DAGS and B and F." (Interview with Waihee, June 29, 1983.)

Delegate Peter C. Lewis argued that the amendment was "needed to enable the university to move quickly and efficiently in managing its internal affairs in order to maintain and improve its position of research leadership among the nation's topflight universities." He also stated that "it is needed to expedite the university's internal capability to meet the changing instructional demands of students."

University organizations which cannot move with reason and dispatch . . . may soon find themselves left in the wake of other institutions. This amendment will assure the university the kind of internal management flexibility it needs in order to compete successfully.

He also pointed out that it would not diminish the budget appropriation powers of the governor or the legislature nor affect the application of civil service and collective bargaining laws. (PROCEEDINGS, 1978, II, pp. 234-235.)

Some delegates objected that the "Notwithstanding" clause "went too far." (Telephone interview with Ralph Miwa, June 6, 1983.) Delegate Donna Odanaka, a UH student elected to the Convention, pointed out that there was an apparent contradiction between the clause which "says that the board's powers are under law" and the new wording which would give the board powers "notwithstanding any law."

I am fearful of letting the courts clear this up; my fear is that if the courts decide this new language should be taken as it reads, we will have given tremendous powers to a group accountable only to the governor.

As a student at the university, I am afraid that this constitutional power might allow the board, if it so desires, to close any program it wants, or to influence campus organizations such as the Associated Students of the University of Hawaii, the student newspaper, or any other mechanism or facilities important to the free and dynamic movement of ideas within and out of the university. With complete control over funding within the UH system, might the university someday become even more of a political football than it is today, with a legislature hesitant to hand over money to a board so controlled by a hostile governor?

I favor the intent of the amendment--to free the university administration, faculty and students from strangulation by the state bureaucracy. I favor this amendment as long as it means all that I have said. (PROCEEDINGS, 1978, II, 236.)

Ihara also recalls that the Attorney General's office objected to the same clause. Waihee recognized that the objections of the AG and some of the delegates to the loss of powers by the Legislature and the executive agencies might create a losing vote on the floor, and, acting in an informal role not unlike that of a majority floor leader, he sought a compromise which would satisfy both the dissenters and the UH. The wording at the second reading was "negotiated word for word with Harold

Matsumoto," according to Waihee, and introduced as a floor amendment by Delegates Lester T. Fushikoshi and Milton Y. Hirata, both members of the Committee on Education. (Ibid., II, 918.) Consequently, that part of the amendment was re-worded to read (deleted material in brackets, new words underlined):

[Notwithstanding any law relating to the power to formulate policy and to exercise control over the university, the] The board shall have exclusive jurisdiction over the internal organization and management of the university as provided by law; except that this Section shall not limit the power of the legislature to enact laws of state-wide concern. (Ibid., I, 1007.)

The compromise was successful, for it was approved unanimously when it came up for second reading. (Ibid., II, 236.) Upon its passage, it was referred to the Committee on Style.

The Committee on Style was chaired by Thomas Hamilton, former UH president, who remained highly objective in re-wording most amendments, preserving the essence of the amendment while assuring that the form would be consistent throughout the Constitution. However, in this one amendment, he made a change which may well have affected the substance as well as the form of the amendment. In addition to renumbering the article and section, Hamilton completely re-structured the amendment, re-wording the phrase "in accordance with law" to read "as provided by law, thereby making it self-executing. The "stylistic" changes were (deletions in brackets and additions underlined):

The board shall have power, [in accordance with] as provided by law, to formulate policy, and to exercise control over the university through its executive officer, the president of the university, who shall be appointed by the board[. The], except that the board shall have exclusive jurisdiction over the internal organization and management of the university [as provided by law; except that this section] .This section shall not limit the power of the legislature to enact laws of [state-wide] statewide concern. (PROCEEDINGS, I, 669-670.)

It is obvious that these changes met the intent of the Convention, for the Committee of the Whole Report No. 6 explains that the "proposal is to be self-executing;"

the phrase, "as provided by law," is to guarantee that the legislature shall implement to the extent necessary any of the board's jurisdictional powers to effectuate the grant herein of the exclusive jurisdiction over the organization and management of the University. To this end, the legislature shall amend or enact such laws as may be necessary to provide the board of regents with exclusive control of the internal organization and management of the University. This amendment is not, however, intended to affect the role of students, faculty and staff members in the affairs of the University. (Ibid., I, 1007-1008.)

The proposed amendment was adopted on September 5, by a vote of 92 ayes, 2 noes, and 8 excused. (Ibid., I, 265-266.)

The amendment was ratified by the electorate in November, so that Article X, Section 6, which defines the BOR's powers, reads:

Section 6. There shall be a board of regents of the University of Hawaii, the members of which shall be nominated and, by and with the advice and consent of the senate, appointed by the governor. At least part of the membership of the board shall represent geographic subdivisions of the State. The board shall have the power, as provided by law, to formulate policy, and to exercise control over the university through its executive officer, the president of the university, who shall be appointed by the board; except that the board shall have exclusive jurisdiction over the internal organization and management of the university. This section shall not limit the power of the legislature to enact laws of statewide concern. (Article X, Section 6, HRS, 1982 Supplement. Emphasis added.)

The Legislative Auditor pointed out in 1983 the ambiguity in Article X in the lack of clarity between what is of "statewide concern" and what is the "internal organization and management" of the University:

Such juxtaposition of language creates fertile ground for controversy, doubt, and misunderstanding if not further clarified. Thus, uniform application of budgetary requirements can cast the university in an undesirable adversary role vis-a-vis the rest of the state government. To date, however, there has not been statutory clarification of the university's role within the overall administrative structure. (Legislative Auditor, 1983, p. 4.)

#### THE POWERS OF THE BOARD OF REGENTS ARE DEFINED IN THE STATUTES.

The 1979 Legislature incorporated the constitutional amendment into the statutes (SESSION LAWS, 1979, Act 86, p. 167.) Section 304-4 of the HAWAII REVISED STATUTES, which had read, "The board of regents shall have general management and control of the affairs of the university," now begins:

The board of regents shall have management and control of the general affairs, and exclusive jurisdiction over the internal organization and management, of the university. (Section 304-4, HRS, 1982 Supplement.)

Chapter 304 of the HAWAII REVISED STATUTES defines the BOR and its powers. Section 304-2 grants the university, "under the direction of the board of regents" the following "general powers:"

- (1) To adopt, amend, and repeal bylaws governing the conduct of its business and the performance of the duties granted to or imposed upon it by law.
- (2) To acquire in any lawful manner any property, real, personal, or mixed, tangible or intangible, or any interest therein; to hold, maintain, use, and operate the same; and to sell, lease, or otherwise dispose of the same at such time, in such manne, and to the

extent deemed necessary or appropriate to carry out its purposes.

(3) To enter into and perform such contracts, leases, cooperative agreements, or other transactions as may be necessary in the conduct of its business and on such terms as it may deem appropriate, with any agency or instrumentality of the United States, or with any state, territory, or possession, or with any political subdivision thereof, or with any person, firm association, or corporation.

(4) To determine the character of and the necessity for its obligations and expenditures, and the manner in which they shall be incurred, allowed, and paid, subject to provisions of law specifically applicable to the university.

(5) To execute, in accordance with its bylaws, all instruments necessary and appropriate in the exercise of any of its powers.

(6) To take such actions as may be necessary or appropriate to carry out the powers conferred upon it by law. (Section 304-2, HRS, 1982 Supplement.)

Section 304-11 gives the Board the power to appoint faculty members and administrators and to determine their salaries and terms of service.

Section 304-11. The faculty of the university shall be under the direction of a president who shall be appointed by the board of regents. The board shall appoint such deans, directors, other members of the faculty, and employees as may be required to carry out the purposes of the institution, prescribe their salaries and terms of service, where such salaries and terms of service are not specifically fixed by legislative enactment, make and enforce rules governing sabbatical leaves with or without pay, consistent with the practice of similar institutions on the mainland, and notwithstanding the laws of the State relating to vacations of the officers and employees of the State. (Section 304-11, HRS, 1976.)

Pursuant to this section and Section 89-9, the Board may enter into a collective bargaining agreement providing for tuition exemption for faculty and staff members. (Att. Gen. Opinion 74-12.) The waiver or exemption of tuition fees for faculty and staff members was interpreted by the Attorney General as a "term of service."

Section 304-13 directs the Board to classify, evaluate, and compensate all university employees in conformance with the State public employee compensation law. In this section, the State Department of Personnel Services is limited to rendering "such assistance as may be practicable."

Section 304-13. The board of regents shall classify all members of the faculty of the university including research workers, extension agents, and all personnel engaged in instructional work as defined in section 76-16 and adopt a classification schedule conforming, as nearly as may be practicable, to the schedules set forth in

chapter 77. The department of personnel services of the State shall, upon request of the board of regents, render such assistance as may be practicable in connection with such classification. The adjustments of compensation to conform with the classification shall be made in general accordance, so far as may be practicable, with chapter 77, relating to state employees.

Annual increases of compensation shall be allowable, and shall be allowed, in general accordance, so far as may be practicable, with chapter 77, providing for the allowance of annual increases to state employees for efficient service, and the board of regents shall adopt a fair and reasonable plan for rating the efficiency of individual employees affected by this section. (Section 304-13, HRS, 1976.)

Other sections of chapter 304 deal with specific branches and programs of the University of Hawaii.

Chapter 305 deals with the community colleges, and section 305-2 gives the Board of Regents the "authority to establish and govern community colleges." It gives the Board "the same powers with respect to the community colleges that it has as to the university in general." (Section 305-2, HRS, 1976.)

Chapter 306 covers University projects, including housing units, athletic units, and "any other undertaking constructed, maintained, or both, by the university in furtherance of the purposes of the university."

Section 306-2. In addition to the powers which it now possesses, the board of regents shall have power to:

(1) Construct and maintain university projects, including a university project included or to be in a university system;

(2) Combine two or more university projects, now or hereafter existing on any one or more of areas of any one or more of the educational institutions under the control of or governed by the board, into a university system or systems, and to maintain such system or systems;

(3) Prescribe and collect rents, fees, and charges for the use or enjoyment of any of the facilities of any university project;

(4) With the approval of the governor, issue revenue bonds, to finance in whole or in part the cost of construction, or maintenance, or both, of any university project included or to be included in a university system;

(5) Pledge to the punctual payment of such revenue bonds and interest thereon, the revenue of the university project or projects for the construction or maintenance of which the bonds have been issued, or the revenue of the university system in which such university project is to be included, and the revenue of other or all university projects or university systems, in an amount sufficient to pay such bonds and interest as the same become due and to create and maintain reasonable reserves therefor;

(6) Advance such money of the university, not otherwise required, as are necessary to pay the expenses incurred in making the preparations for the initial issuance of revenue bonds under this chapter, and to take any other action necessary or proper for carrying into execution and administering this chapter, including providing for the full utilization of university projects in every way conducive to the furtherance of any or all of the purposes of the university. (Section 306-2, HRS, 1976.)

Chapter 308 provides for parking at the UH and gives the BOR authority to "make rules and regulations governing the traffic and parking conditions on the roadways and other areas under the jurisdiction of the university." It also gives them the authority to assess fees for parking. (Chapter 308, HRS, 1976.)

At another point in the statutes there is a reference to the BOR which is difficult to explain. In the chapter which defines the executive departments of the State, the BOR is described as an "executive board," but an opinion by the AG holds that the "University is a constitutionally independent corporation and not an administrative or executive agency." (HRS, following Section 26-11.) Act 86 of the 1979 legislative session has incorporated the 1978 constitutional amendment into Section 26-11.

Section 26-11. The University of Hawaii shall be headed by an executive board to be known as the board of regents.

The board of regents shall appoint and may remove an executive officer to be known as the president of the University of Hawaii.

The board shall consist of eleven members. No more than six of the members shall be members of the same political party and at least part of the membership of the board shall represent geographic subdivisions of the State.

The board shall have power, in accordance with the Constitution of the State and with law, to formulate policy, and to exercise control over the university through its executive officer, the president of the university. The board shall have exclusive jurisdiction over the internal organization and management of the university.

The University of Hawaii as heretofore constituted as a body corporate is continued as the University of Hawaii established by this chapter. (Section 26-11, HRS, 1982 Supplement. Emphasis added.)

Note in the fourth paragraph that the "executive" board has an "executive officer." Except for the AG's 1961 opinion, there is no clarification of these references to "executive" responsibility.

Another major reference to the authority of the Board is contained in the collective bargaining chapter, where the public employer for the purposes of negotiations with two units which include UH faculty and UH personnel other than faculty (Units 7 and 8) include "the governor and his designated representatives of not less than three together with not more than two members of the board of regents of the university of Hawaii." (Section 89-6,

(b), HRS, 1976.) Thus Regents constitute a minority on the management team which represents the public in negotiating with faculty and APT employees and have no representation at all in the negotiations with UH civil service employees.

THE LEGAL AMBIGUITIES AND CONTRADICTIONS WERE POINTED OUT TWENTY YEARS AGO.

The 1961 Legislature authorized a study of "the organization, relationships, and development planning of the University of Hawaii." The study was conducted in 1961-62 by staff members of the Division of Higher Education of the U. S. Office of Education. The study was very thorough, with over 130 man-days of field work during which interviews were held with more than fifty persons in leadership positions in government, business, and civic affairs. The final report was edited by G. V. Martorana, who was survey director, and Ernest V. Hollis, who was the chief consultant on the survey. (Martorana and Hollis, 1962 pp. xiv-xvi.)

The chapter (VI) on "University Governance and Internal Organization" begins by criticizing the contradictions arising from the statutory designation of the Board of Regents as an "executive board." The survey report points out that the August 1961 Attorney General's opinion that the University is a "separate entity independent of the executive branch of the State government, and, therefore, is not an executive or administrative department or instrumentality of State government responsible to the Governor" is in "disagreement with the organization chart (March 1960) of the State government, which shows the University of Hawaii as a department responsible to the Governor." (Ibid., p. 161.) The survey reports that in spite of the Attorney General's opinion, "The general view held in the Hawaii State government is that, at least operationally, the University of Hawaii is a department in the executive branch." (Ibid., p. 201.) Among the key recommendations of the survey report was one urging the independence of the University by separating it from the political involvement with the executive branch of State government, a recommendation that has still not been made effective twenty years later.

The survey staff recommends:

(D-1) That, insofar as possible, every effort be made to consider the statewide university system of the State of Hawaii as an administrative unit that is separate from the major structure of the executive branch of the State government; that in the development of statutes the university not be expected to conform as if it were "just another" department of the executive branch; and that, as an intermediate step, the president of the university no longer be considered as a member of the "Governor's cabinet."

The university, established within the constitution of the State, is dependent upon the Legislature for various statutes whereby its status is further described and implemented and for its financial

support. Its clear constitutional base, however, appears to provide it with guarantees against political encroachment and operational autonomy from all branches of State government. The public universities in the United States which have had a marked growth in quality have been able to achieve over the years a high level of freedom from direct political involvement. (Ibid., pp. 288-9. Underlining in source.)

The survey also pointed up the dangers of Legislative control over the University. Because the State Constitution provides that the Board's power be "in accordance with law," "the line between conditions which the Legislature can impose on the university and those which it cannot" are "controversial and subject to legal interpretations." (Ibid., p. 161. Underlining in source.) In summing up the relations with the Legislature, the survey report concluded:

Regulation of the university by statute plus special conditions sometimes attached by the Legislature to university appropriations result in an over-involvement of the Legislature in matters which should be the responsibility of the Board of Regents.

On occasion, legislators individually and legislative committees advance ideas for the university's development through legislative channels rather than through university channels. (Ibid., pp. 201-202.)

The survey staff thus recommended:

(D-6) That the Legislature and its committees refrain, except in the most unusual circumstances, from attaching special conditions to selected legislation and from undue regulation by statute.

Carried too far, such an approach to legislation can lead to an assumption by the Legislature of functions which are the prerogatives of the Regents. (Ibid., p. 289. Underlining in source.)

The chapter (VII) on "Relationships of the University to Other Agencies and Organizations" detailed some of the problems developing from the procedure of having the University subjected to the review of executive agencies of the State government, such as the Departments of Personnel Services, Accounting and General Services, and Budget and Review (now Budget and Finance.) (Ibid., pp. 179-182, 201.) Among the recommendations of the survey staff was "That all employee positions in the University of Hawaii . . . be placed under Regent control classification and removed from that of the State Department of Personnel." That recommendation "should be considered as a first step toward giving the University autonomy in operating its own personnel system, as is the practice in most of the outstanding mainland State universities." (Ibid., p. 289. Underlining in source.)

Another recommendation called for giving the Regents autonomy over its long range planning and campus construction, roles then played by the Departments of Planning and Research and

Accounting and General Services.

(D-4) That the Legislature and executive branch of State government recognize the long-range planning for the university program of capital improvements is a responsibility of the university and authorize the Board of Regents and administration to employ architects, review plans, and manage contracts for construction of all university building projects.  
(Ibid., p. 289. Underlining in source.)

In light of the fact that there are currently a number of reports calling for the implementation of the 1978 Constitutional amendment, it is interesting to note that this 1962 report introduced its series of recommendations on "Government, Internal Organization, and Administration" with the strong statement that The survey staff is unanimous in the view that one of the chief objectives of the university in the near future should be to reassert its constitutional status and the prerogatives attached to this status.  
(Ibid., p. 283.)

Although most twenty-year-old studies are out-of-date and conditions change, UH administrators complain that they still face many of the same difficulties in relating to both executive agencies and the Legislature. Clearly the State did not take seriously the survey team's criticisms about governance of the University and thus did not implement the recommendations regarding the autonomy and independence of the UH and the BOR.

**THERE ARE STILL MANY STATUTORY CONFLICTS WITH THE BOARD'S CONSTITUTIONAL AUTHORITY.**

There are many points at which the statutes require or permit State executive agencies to be involved in the management of the UH, but the key point is in defining the UH as one of the "principal departments" of State government which are "under the supervision of the governor." (Section 26-4, Hawaii Revised Statutes.) This carries out the Constitutional provision (Article V, Section 6) which appears to identify the UH as one of the executive departments by exempting the UH president from the residency requirement for the head of a principal department under the supervision of the governor. Assigning to the Governor the supervision of the UH president clearly contravenes the Regents' Constitutional authority.

Two other examples of interference appear in Section 26. One is the present limitation on the UH president as a department head in the abolition or establishment of divisions within the UH without the approval of the Governor (Section 26-38). The Governor's approval is also required in order to "establish or abolish any subordinate office or position, transfer officers and employees between positions, appoint and remove any subordinate, and change the duties, titles, and compensation of offices and positions as is deemed necessary by the head of the department for the efficient functioning of the department." (Section 26-39) Although a procedure has been worked out to allow the UH and the BOR to make changes without prior approval of the Department of Budget and Finance, this issue has only recently surfaced again.

In a December 1, 1982 memorandum, Governor Ariyoshi froze all appointments in the State without his written permission. Just at that time, the UH-M was processing the second semester appointments of graduate assistants, who were essential for the instructional and research programs at the UH-M. In the exchange of memoranda and negotiations, B & F requested a breakdown of graduate assistant positions, including the organization or program being served, a statement of the function of each position, and the FTE count of each position. The requirement reveals a clear lack of understanding of the role of graduate assistants and the short-term nature of such appointments. The volume of paperwork required greatly hampered the on-going work of the University, particularly Manoa, without any savings in funds for the State, indeed considering the wasted time of UH administrators in responding to the request, a considerable loss. Clearly the UH loses the necessary flexibility to meet changing needs effectively and efficiently when an outside agency can interfere with appointments and transfers within the UH.

The Legislative Auditor has pointed out how B & F's "stringent justification requirements" can impose inflexibility on the UH without generating significant savings in funds:

Program managers need a certain amount of flexibility in adjusting their budgets during the budget execution period, and these requirements seem excessive in light of the fact that these types of transfers represent about one percent of the general fund appropriation. The apparent reason for the stringent controls being exercised by B&F over transfers within programs is to influence savings. However, the net effect is to impose extremely burdensome procedures over a relatively minor portion of budgetary adjustments. It amounts to over control by the State's central budget agency.

Our assessment is that university should be allowed to make transfers within programs following its own approval procedures within the university and without having to secure approval by B&F. (Leg. Auditor, 1983, pp. 21-22.)

A second general area of State involvement with UH management is in delegating to other agencies the responsibility for carrying out some of the functions inherent in administering the UH. As UH law professor pointed out in a memo regarding a "Survey of Constitutionally Autonomous Universities,"

Indirect controls exercised by centralized budgetary, comptrolling, or purchasing agencies, . . . while perhaps less apparent than direct legislative or executive mandates interfering with university operations, the effect can be the same--to rob and erode the autonomous university of its constitutionally mandated authority. (Brown, p. 2.)

An example is the requirement that the AG represent "the State in all civil actions in which the State is a party." (Section 26-7) This, and the prohibition in Section 103-3 that public funds may not be spent for attorneys by any department of the State unless the AG approves and the Governor waives the prohibition, would limit the BOR in seeking their own legal counsel if they sought an action which was not sanctioned by the Governor or the AG. For example, the BOR could not hire

attorneys to conduct a suit against the State for denying the BOR its Constitutional authority. Incidentally, the statutes exempt certain departments from this prohibition, including the Hawaii Housing Authority, Public Utilities Commission, Legislative Reference Bureau, Hawaii Crime Commission, and Office of Hawaiian Affairs. (Section 103-3.)

Section 107-10 requires that the AG give prior approval for the acquisition of real property. If the BOR had the authority to employ their own counsel, this potential involvement with partisan politics would be reduced.

One executive agency which gets deeply involved with the management of the UH is the Department of Budget and Finance. Section 26-8 gives B & F not only the responsibility to "conduct a systematic and continuous review of the finances, organization, and methods of each department of the State," but it is also charged with the "preparation and execution" of the budget. Section 37-35 requires the Director of Finance to review all estimates submitted to him and "having due regard for the probable future needs of the department . . . shall approve, increase, or reduce the amount of the estimate." This gives B & F the oft-used authority to make major changes in the budget submitted by the UH through the BOR, even to manipulating priorities. This occurred in the 1984-85 supplemental budget request when the UH priorities were restoration of funds for library books, graduate assistant stipend increases, creation of a computerized student information and registration process, and funds to meet UH's contractual obligation for construction of the Mauna Kea mid-level facility. B & F deleted these BOR-approved priorities and substituted their own: funds for a Pacific International Center for High Technology Research and six janitorial positions. When President Matsuda appealed to Governor Ariyoshi, the Governor not only supported the B & F interference with the BOR's authority, but he also added a "proviso on how high technology funds are to be spent at UH." ("Chancellor's Bulletin," p. 4.)

Section 37 contains a number of other provisions which involve B & F in managing the UH. After the Legislature has made its appropriation, the Director of Finance sets up quarterly allotments to each agency (Section 37-2) and has the authority to "modify or amend any allotment previously made" (Section 37-36). Section 37-38 requires that all expenditures be made according to the classifications prescribed in the appropriation measure by the Legislature and that "the funds allotted for each classification of expenditure shall be used for no other classification of expenditure." Section 37-41 requires that any funds not expended or encumbered by the end of a fiscal year shall lapse to the general fund. These clearly interfere with the Regents' authority to manage UH expenditures in the most efficient and effective manner, as provided in Section 304-2 and 304-4.

If the UH is to have the flexibility to meet its needs, it must have the freedom to determine its own budget, within the limits of its funds, appropriated and otherwise. If, as the LRB described them (see pp. 16-17 and 19 above), State universities are the fourth branch of government because of their responsibility for serving as the conscience of the State, there

is a precedent in the statutes for exempting the UH from the control of B & F. Section 37-33 exempts the courts and the Legislature from the allotment system by which B & F controls the quarterly spending of other departments. Section 40-2 grants the judiciary, Legislature, and the counties the responsibility for establishing and maintaining their own accounting systems.

Another agency which is deeply involved with the management of the UH is the Department of Accounting and General Services. DAGS is required to "preaudit and conduct after-the-fact audits of the financial accounts of all state departments . . . ; manage the inventory, equipment, surplus property, insurance, and centralized purchasing programs of the State; establish and manage motor pools; undertake the program of centralized engineering services, including operation and maintenance of public buildings, for departments of the State; . . . and establish, analyze, and enforce accounting and internal control systems." (Section 26-6) These tasks are detailed further in Sections 40-1, 2 and 6. The head of DAGS, the Comptroller, has the authority to withhold payments when a DAGS preaudit questions the "propriety" of an expenditure (Section 40-1).

Sections 103-22 and 23 prescribe procedures for bids of purchases greater than \$4000. Many items of research equipment needed by the UH far exceed this modest amount, yet the BOR is not empowered to authorize such purchases without going through State-prescribed red-tape which often delays for months acquiring needed research equipment, even though such purchases may be from a Federal grant. The inflexibility of the State system creates real problems for those programs which must meet Federal deadlines for progress reports on grants for short term projects. Other sections deal specifically with bids for printing, binding or publishing publications, but, interestingly, those requirements do not apply to the University of Hawaii Press (Section 103-52). That being the case, there seems to be no reason why all the University should not be exempt from the other bidding requirements.

Section 106-11 also restricts purchasing with State funds to those persons "designated by the governor." Section 106-22 requires that any proceeds derived from the sale of property by a State agency be deposited with the Director of Finance.

Section 29-6 has been a real thorn in the side for UH principal investigators with Federal grants for research or training. It requires that "all federal-aid moneys received by the State, except as otherwise provided for by the federal government, shall be deposited with the director of finance and shall be disbursed upon warrants drawn by the comptroller of the State." This has permitted the State to skim off up to forty percent of Federal grants as "overhead," as required by Section 107-5, which provides that DAGS "shall be reimbursed for the reasonable costs incurred in furnishing supplies and performing services for any other state department." This same section, however, exempts the Department of Land and Natural Resources from those fees. The UH generates millions of dollars in Federal grants, yet only a portion of those funds can be applied directly to the research or training projects being funded because of the heavy "overhead" withheld by the State.

There are a number of minor conflicts between the Constitutional authority granted to the BOR and the powers accorded to DAGS. For example, it requires a written recommendation of the Comptroller and permission by the Governor for any officer or employee of the State to use, operate, or drive for personal use (but not for pleasure) any motor vehicle owned or controlled by the State." (Section 105-2, <4>) Thus, the BOR cannot on its own authority grant permission for the President to use a University-owned car for his personal use.

Section 94-3 requires that only the Comptroller may decide on the disposal of government records, and upon his recommendation documents from other agencies may be transferred to the public archives, the Hawaiian Historical Society, or to the University. How much of the vast accumulation of paper at the University is in the category of records worth keeping and who is best qualified to determine its value? Also, perhaps the UH would not welcome the cost and responsibility of preserving some documents transferred to it by the Comptroller.

A third minor issue is the authority of the Comptroller and the State Foundation on Culture and the Arts for the "selection of, commissioning of artist for, reviewing of design, execution and placement of, and the acceptance of works of art." According to this, BOR is not the final authority on accepting a gift of artwork from a student or faculty member wishing to honor the institution or even where to place it on the campus.

Statutes have also created a number of University programs and centers. For example, Section 222-1 assigns to the UH the Hawaii Research Center for Futures Study, but requires that its director report annually to the Governor and the Legislature, not to the Regents or the President. Section 234-7 requires the UH to establish standards or formulas for setting the amount of crop loss claims due to natural disasters. Section 341-3 establishes "within the university an ecology or environmental center."

There are many other examples of statutes which conflict with the BOR's Constitutional responsibilities. Indeed, prior to the 1980 Legislative session, UH administrators compiled a forty-eight page list of State statutes affecting the Board of Regents and the UH. As a result of this review, twelve changes in the statutes were recommended in order to remove conflicts with the Regents' Constitutional authority. Four additional areas were noted as needing further study. Unfortunately, virtually nothing of consequence has been accomplished in the intervening four legislative sessions.

#### THERE ARE MANY ISSUES WHICH NEED CLARIFICATION.

1. The Constitutional amendment which appears to make the UH a principal department of State government through the exemption of the president from the residency requirement needs to be reviewed. (See page 31 above.)

2. Section 26-4 should be amended to remove the UH from the list of principal departments. (See page 31 above.)

3. Collaterally with that, Sections 26-38 and 26-39 should be amended to confirm the Regents' jurisdiction over the internal management and organization of the UH. (See page 31 above.)

4. The BOR should have authority to employ its own legal counsel. (See pages 32-33 above.)

5. The BOR must have the right to present its own budget to the Legislature, which then considers the priorities in that budget rather than having only those priorities imposed on the UH by B & F. (See pages 33-34 above.)

6. Permit the BOR to expend the UH appropriation without the constraints of executive agencies. (See pages 33-34 above.)

7. Exempt the UH from DAGS pre-audits, since it is the responsibility of the BOR to determine priorities within the UH. (See page 34 above.)

8. Permit the BOR to set up bidding procedures for UH purchasing. (See page 34 above.)

9. Allow the BOR to administer all Federal funds granted to the UH without withholding "overhead." (See page 34 above.)

10. Finally, the Legislature should consider carefully the practice of mandating new programs, a clear responsibility of the Board of Regents. (See page 35 above and the next section.)

ATTEMPTS TO IMPLEMENT THE AMENDMENT THROUGH LEGISLATION HAVE BEEN GENERALLY FUTILE.

In spite of the 1978 Con-Con's intent that the phrase "as provided by law" would make the amendment "self-executing" and "guarantee that the legislature shall implement to the extent necessary any of the board's jurisdictional powers to effectuate the grant herein of the exclusive jurisdiction over the internal organization and management of the University" (see the Committee of the Whole Report No.6, page 24 above), only three very minor changes have been made in the statutes to make them conform to the amendment. The impact has been so insignificant that it appears that the Legislature and the Governor have chosen deliberately to reject the UH efforts to secure its Constitutional independence through legislation.

Act 71 of the 1980 Legislature repealed Sections 304-45 to 304-49, which had established the Overseas Operation and Asian Studies Programs by Legislative fiat. (SESSION LAWS, 1980, Act 71, p. 95.)

Act 72 amended Section 304-20, revising the sentence on teacher education from "In the matter of curriculum the university authorities shall obtain, as far as possible, the approval of the department of education" to read "the university authorities may obtain the approval of the department of education." (Ibid., Act 72, p. 95. Underlining added.) A one-word change! That change, however, is a recognition that the BOR has the authority to approve the curricula of the UH.

In 1981 the Legislature noted that Section 457-5(a) (2), which empowered "the board of nursing to approve curricula for educational programs preparing persons for licensure," was "in conflict" with Article X, Section 6 of the State Constitution, "which empowers the board of regents to approve programs and curricula within the university system." Consequently, Act 57 deleted the words "approve curricula for educational programs" from the powers of the Board of Nursing. (SESSION LAWS, 1981, Act 57, pp. 86-87.)

A bill was introduced in the 1983 session which proposed amending Section 26-11 (see page 28 above) in order to "clarify the jurisdiction of the University of Hawaii in its relationship with other state agencies and to effectuate the jurisdiction of the board of regents over the internal organization and management of the University." The amendment incorporated words from Standing Committee Report No. 39 of the Committee on Education on the 1978 Con-Con (see page 22 above.) The bill, while specifying certain powers, also contained the principle that the "Act shall be liberally construed to accomplish its purposes." The new statutory material proposed read:

Notwithstanding any other law to the contrary, the jurisdiction over internal organization and management shall include, but not be limited to, the authority to establish, reorganize, abolish, or transfer administrative offices, units or employees within the university, subject only to the limitations of legislative appropriations and the provisions of chapters 76, 77, and 89. (SBNo. 1258, S.D. 1)

The report of the Senate Committee on Higher Education recommended the passage of the bill, stating that

by having such authority rest with the Board of Regents, your Committee believes that the University could move more expeditiously in responding to the organizational and management deficiencies uncovered by the Legislative Auditor. . . . The University, in turn, would be held directly accountable for action taken or not taken in response to this, or any other similar audit. (Standing Committee Report No. 403.)

In spite of this effort--and the important note of increased accountability coming with increased autonomy, the bill (which passed the Senate on March 16, 1983) was blocked in the House. Once more the Legislature seemed unwilling to make the statutes conform to the Constitution.

#### NEGOTIATIONS WITH THE EXECUTIVE BRANCH HAVE RESULTED IN NO CHANGE

In the July 1983 Makaha conference involving Regents, President Matsuda and other central administrators and administrators and faculty from UH-Manoa, the President urged that no action be undertaken to seek further implementation of the 1978 amendment, because he had assurances from the Governor that many of the operational constraints placed upon the University are the result of administrative directives which were within the Governor's power to amend. In acting on that assurance, the President had sent to the Governor in June a number of draft memoranda to be sent to B & F and DAGS, each one specifically exempting the UH from an administrative directive or authorizing the BOR to undertake actions previously limited by executive agencies. For example, one memo would have given the BOR the authority to transfer funds within a campus or between campuses and to acquire electronic data processing hardware and software for administrative purposes without B & F control. Another would allow the BOR to undertake emergency repairs of UH facilities without DAGS approval. A third would allow the BOR to negotiate with vendors when no conforming bids are received. A

fourth would exempt the UH from the requirement of prior approval in the purchase or lease of copying machines. Although the letter to the Governor stated that the "University will, of course, operate within the resources made available to it, and will submit a report at the end of each fiscal year describing actions taken pursuant to" the new procedures, there is no evidence that the Governor acted on any of the requests. The constraints on the UH are still the same.

#### THE UNIVERSITY MUST TAKE THE INITIATIVE IN SECURING IMPLEMENTATION OF THE AMENDMENT.

The fact that there has been so little change in meeting the recommendations of the 1962 survey or in changing practices to reflect the intent of the 1978 amendment is a strong indication that neither the Legislature nor the executive branch will take any initiative in implementing the Board's "exclusive jurisdiction." If the BOR is to gain its legitimate authority, it must, as the 1962 survey recommended, assert "its constitutional status and the prerogatives attached to this status." No bureaucracy willingly gives up its power. That certainly appears to be true in Hawaii. It is up to the BOR and the UH administration to challenge the agencies which have continued to ignore the 1978 Constitutional amendment. To fail to do so deprives the UH of the independence and intellectual freedom essential for it to fulfill most effectively its missions of instruction, research, and community service, including that socially necessary role of pointing out to the community the flaws that need correcting and some of the solutions which might relieve those problems.

The challenge may be informal, through negotiations with the Governor and the executive agencies, but past efforts in this direction have resulted in little change. A second approach is through the introduction of bills in the Legislature, which again has shown only minimal change. A third option is to institute litigation, an alternative which may be slow because of delays in the court system and which may result in ill-will from both executive and legislative branches.

A fourth option, and one which might be most effective in the long run, is to attempt to involve the larger community in the discussion of the problems of the accountability and autonomy of the University, with the hope that an enlightened electorate can influence the political process and lead the political leaders in sustaining a university which will be able to serve the needs of the State more effectively and efficiently.

In a speech before the 1983 UH Strategic Planning Colloquium, President Fujio Matsuda summarized the matter very succinctly:

We cannot continue to be viewed as just another State department as we often are by state government bureaucracies. . . .

<L>imited resources heighten the need for University autonomy and flexibility to manage our resources to enable the institution to respond to change, and to be held accountable for efficient and effective resource utilization. Implementation of the 1978 Constitutional

amendment . . . must be achieved if the University is to have the flexibility to fulfill its broad range of missions under rapidly changing conditions, free from external interference. I don't see any other viable alternative. (Matsuda, pp. 37-38.)

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#### INTERVIEWS

(Identifications are those relevant to the 1978 Con-Con.)

Teruo Ihara, Delegate and Chairman of Education Committee, 1978 Con-Con, by telephone, June 6, 1983.

Kenneth Lau, University administrator, at UH-Manoa, May 25, 1983.

Peter Lewis, Delegate 1978 Con-Con, by telephone, June 11, 1983.

Ralph Miwa, University administrator and lobbyist, by telephone, June 11, 1983.

Alice Takehara, Delegate and Vice-Chairperson of Education Committee, 1978 Con-Con, by telephone, June 6, 1983.

John Waihee, Delegate, 1978 Con-Con, at the Lt. Governor's Office, State Capitol, June 28, 1983.